88-740

Supreme Court, U.S.
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NO. _____

SUPREME COURT OF THE UNITED STATES
October Term, 1988

W. VICTOR MADEJ,
Petitioner,

vs.

AIR PRODUCTS & CHEMICALS, INC.,
Respondent.

ON APPEAL TO
THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

PETITITION FOR A WRIT OF CERTIORARI

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SEP 19 1988

QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial court erred in granting Defendant's Motion For Summary Judgment where genuine issues of material fact exist concerning Plaintiff's allegations that Defendant breached an employment contract entered between Plaintiff and Defendant for a definite duration of employment?

II. Whether the trial court erred in granting Defendant's Motion For Summary Judgment where genuine issues of material fact exist concerning allegations that Plaintiff reasonably relied upon Defendant's promise, which promise Defendant should have reasonably expected to induce action or forbearance of a definite and substantial character by Plaintiff; and such promise did induce such action or forbearance and that injustice can be avoided only by enforcement of the promise?

III. Whether the trial court erred as matter of law in sustaining the Defendant's Preliminary Objections to the Complaint where the Plaintiff pleaded a cause of action indicating that the Defendant breached a covenant of good faith dealing in employment contracts?

IV. Whether the trial court erred as a matter of law in sustaining the Defendant's Preliminary Objections to the Complaint where the Plaintiff indicated a cause of action for a retaliatory termination of his employment because Plaintiff exercised his constitutional right to free speech and his contractual obligation to monitor safety practices of this employer; which discharge violates public policy forbidding limitations of constitutional rights?

LIST OF PARTIES

The parties in the proceedings below were Petitioner, W. VICTOR MADEJ, and Respondent, AIR PRODUCTS & CHEMICALS, INC.; a multinational corporation with headquarters in Pennsylvania.

The nature of the Questions Presented For Review makes pertinent the identity of the specific directors during the year 1982. Initiating correspondence and complaints were sent to the Board of Directors, by name.

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C. Opinions, Judge Backenstoe, (Lehigh County Court of Common Pleas).

D. Opinion and Order of Superior Court of Pennsylvania, 5 November 1987.

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STATEMENT OF THE CASE

Petitioner was a Cost Engineer who graduated from the U.S. Military Academy at West Point in 1970, and served full-time in the Infantry and in the U.S. Army Special Forces (Plaintiff's Affidavit, paragraphs 14 & 15).

During 1977, Petitioner began civilian employment as an industrial engineer for Corning Glass in New Martinsville, West Virginia. At that time he was also serving in an Army Reserve Engineer Battalion and, in his spare time, working on a Master's Degree in Business Administration.

During 1979, Petitioner remained successfully and gainfully employed by Corning glass (a multinational corporation) earning in excess of $20,000.00 per year, plus $98.00 per duty day in his position with the Army Reserve. Petitioner maintained an excellent performance and attendance record with Corning Glass.

Based upon Petitioner's outstanding educational, military and employment background, Respondent contacted Petitioner and and induced him to seek a career with Air Products (Plaintiff's Affidavit, paragraph 8). About mid-April 1979, Petitioner was requested to fly to corporate headquarters in Pennsylvania, at Respondent's expense, so that he could be interviewed regarding employment (Plaintiff's Dep. w. p. 12).

After a series of interviews, Respondent wrote to Petitioner on May 4, 1979 with an offer of employment (Plaintiff's Affidavit, Exhibit D), affirming that Air Products was "convinced of the mutual satisfaction that will result from your decision to join us." They further assured the Petitioner that "you will find excellent opportunities for continued career growth and development at Air Products (Plaintiff's Affidavit and Exhibit D).

Petitioner rejected this initial offer of employment because he had a secure position and family life in West Virginia. He also had a firm alternative career opportunity with the Federal Government, because the Army had offered Petitioner a specific position in his geographic area (Defendant's Dep., Exhibit No. 4).

As a result of Respondent's perseverance; i.e., induce-

ments of more money and repeated verbal and written promises, Petitioner finally decided to uproot his family and move to Allentown, Pennsylvania for the promised career position with Air Products. (Plaintiff's Affidavit, Paragraph 8). Specifically, Respondent continued promises of job security (Plaintiff's Dep. p. 64 L21-23;Plaintiff's Affidavit, Paragraphs 6, 7, 11), and on 29 May 1979, wrote to Petitioner with an increased salary offer (Plaintiff's Affidavit, Exhibit G). In consideration of these promises, Petitioner agreed to drastically alter his way of life (Plaintiff's Affidavit, paragraphs 35, 37).

This alteration, effectively destroyed the pattern of the Petitioner's existence, and is is enumerated as follows:

▸ He resigned his position at Corning Glass where his salary (adjusted for cost-of-living difference) approximated the salary offered by Respondent.

▸ He rejected the firm offer of military employment as Training Officer (Defendant's Dep., Exhibit No. 4); and the total compensation package offered by the Army was similar to that of Air Product's (Plaintiff's Dep. p. 28 L25).

▸ He found an equivalent house in Allentown, but it cost 30% more than his home in West Virginia would bring. He also had to give up a mortgage rate of 8.75% and accept one and at the interest rate of 11.3% with a mortgage 23,000.00 larger than the previous one (Plaintiff's Affidavit, Paragraph 18). Petitioner incurred substantially increased real estate taxes and living costs in the new community. (Plaintiff's Affidavit, paragraph 18). He also endured the nineteen month pressure of being unable to sell his house in a depressed West Virginia housing market.

▸ He was forced to discontinue his graduate education.

▸ He was forced to relocate his wife, then about 4 months pregnant.

▸He gave up his position with the Army Reserve Engineer Battalion, paying thousands of dollars per year, to meet the demands of a new career.

▸ He signed a Patent and Confidential Information Contract (which even today restricts his freedom of expression)

as required by Respondent in partial consideration for a career position. Petitioner agreed to sign said agreement based upon Respondent's promised career position (Plaintiff's affidavit, Paragraph 9).

▸He remained loyal in accordance to his contractual obligation, throughout his employment. At no time during his employment with Respondent did he seek outside or alternative employment (Plaintiff's Affidavit, Paragraph 17).

▸He remained a devoted worker throughout his employment. During the three and one half years work the Respondent he was absent less than a day a year due to illness; and until being told of his termination, he worked about 20% more hours than he was officially allowed to charge (Plaintiff's Affidavit, Paragraph 17).

In order to meet the Petitioner's expressed need for a career position, with security and full benefits for himself and his family, and to entice him to undertake the aforementioned steps the Respondent offered *written* assurances emphasizing the veracity of its promises (Plaintiff's Dep. p. 29 L5-6 and his Affidavit, paragraph 10). The following lists specific documents used to induce the Petitioner's trust:

• A description of benefits defining promises of income *to age 65, plus lifetime monthly* income upon retirement (Plaintiff's Affidavit, Paragraph 3,).

• Assurances about Performance Planning and Appraisal and annual report policy statements on career employment (Plaintiff's Affidavit, Paragraphs 7, 11).

• Statements in the letters that offered employment (Plaintiff's Dep. Exhibits D, E; and his Affidavit Par. 5); never contradicted in numerous employment interviews, no one led him to believe that anything less than a *career* was offered (Plaintiff's Affidavit, Paragraphs 6, 7, 11).

• On 13 July 1979, respondent *in writing* assured third parties about Petitioner's "excellent" probability of continued employment (Plaintiff's Dep. Exhibit I), knowing that this statement would be used to underwrite indebtedness.

After Petitioner began work in the Summer of 1979, the Respondent did carry out some of its promises. In recog-

nition of Petitioner's outstanding performance, Petitioner was given larger than average *annual* salary increases each year (Plaintiff's Dep. 32, L13-15), and was promoted to Senior Cost Engineer on 10 May 1982 (Defendant's Dep. Par. 24.)

Respondent also provided other agreed upon *annual* benefits. In addition to his *annual* salary, there were *annual* vacation and holidays. Other benefits were also expressed in terms of *annual* salary. For example, life and travel insurance were based on a multiple of annual salary, medical and dental coverage had an annual value of about $1,500.00; a company savings and stock ownership plan was said to have been worth $3500.00 annually, unemployment insurance was valued in the amount of about $400.00 annually, social security had a value of $2,170.00 annually, a matching gifts plan was worth about $3,000.00 annually, and an employee shareholder plan was worth about $220.00 annually. The Company valued this as added *annual* income valued about $6,757.00 in 1979 and $10,020.00 in 1982. (Plaintiff's Affidavit, Paragraphs 3 and 4).

The written and oral promises of career, guaranteed *lifetime* monthly income upon retirement, and employment until retirement were not fulfilled. Under the circumstances, the Petitioner concluded that he had been the victim of malicious termination (Plaintiff's Affidavit, Paragraphs 35 and 37). Some indications of this are as follows:

- At the time of the s discharge Respondent continued *outside* hiring of new employees Plaintiff's Affidavit, paragraph 28).
- Respondent retained employees with less seniority and fewer qualifications than the terminated Petitioner (Plaintiff's Affidavit, Paragraph 28).
- Respondent refused to make any offer of an alternate position for which the Petitioner was qualified, in any of a dozen departments where such work was sought (Plaintiff's Affidavit, paragraph 28).
- Respondent refused to leave open the possibility of recalling Petitioner for any type of future re-employment of any duration or salary. (Plaintiff's Affidavit, paragraph 28; Plaintiff's Dep. p. 36-39).

The Petitioner has attributed this malice to several actions:

♦ While employed, Petitioner made several estimates and conducted studies of Respondent's safety costs (Plaintiff's Affidavit, Paragraph 28). Petitioner acted in good faith insisting upon careful attention to issues of safety in cost estimating for the construction of facilities; and was diligent in his efforts to improve the safety at various Air Products facilities. (A classmate of the Plaintiff had died as a result of an oxygen spill at an Air Products facility.) Petitioner safety recommendations, if followed, would reduce Defendant's profits and this provide motivation to remove him (Complaint, Paragraph 45, 46 and 47; Plaintiff's Affidavit, Paragraph 28).

♦ Misdirected management policy, indicated by a lack of specific performance guidance to Petitioner and repeated reassignments within his department (Plaintiff's Affidavit, Paragraphs 21 to 28).

♦ Unlawful violation of Petitioner rights in favor of profits (Plaintiff's Affidavit, Paragraphs 35 to 37, and Defendant's evasions and objections to respond to Plaintiff Interrogatories 1, 6, 12, 35 to 37).

♦ Inventing the "declining economic conditions" that were cited as the cause of the Petitioner dismissal (Plaintiff's Affidavit, Paragraphs 29 to 31; Defendant Deposition, Paragraph 21, 22; and Defendant's evasions and objections to respond to Plaintiff Interrogatories 10, 11, 23, 25 to 28).

REASONS FOR GRANTING THE WRIT

I. Genuine issues of material fact substantiate Petitioner's allegations that Respondent broke an employment contract of definite duration; and breached promises intended to induce action or forbearance by the Petitioner. Injustice can be avoided only by enforcement of the original contract and promises.

Pennsylvania Rule of Civil Procedure 1035(b) states that summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law {*Small v. Seldows Stationary* 617 F.2d 992 (3d Cir, 1980)}. The court is not to decide issues of fact, but simply determine if there is an issue of fact {*Thorsen v. Iron and Glass Bank* 328 Pa.Super. 135, 141, 476 A.2d 928, 931 (1984)}. The facts must be viewed in the light most favorable to the opposing party, and any reasonable doubt as to the existence of genuine issues of fact is to be resolved against the moving parties {*Mattia v.Employers Mutual Companies* 294 Pa.Super. 577, 579, 440 A.2d 616, 617 (1982)}. Summary judgment should only be granted in cases which are clear and free from doubt {*Weiss v. Keystone Mack Sales, Inc.* 310 Pa.Super. 425, 430, 456 A.2d 1009, 1011 (1983)}. Disputed facts preclude summary judgment.

The Petitioner has no doubt that he was promised a career position at Air Products, but the Respondent denies that a specific promise was ever made, and this position has been sustained by the trial court. We can logically accept that a contract includes a more narrow form of promise. Therefore, in substantiating the veracity of his complaints in Count I and II, the Petitioner need only show facts substantiating a single indication of a broken promise or contract to demonstrate the error of the trial court in applying the above standards, and in granting Respondent's Motion for Summary Judgment on Count I and sustaining his Demurrer on Count II..

1. Count I of Plaintiff's Complaint alleges that **Respondent breached its employment contract with Petitioner which contract was for a definite duration of employment which, at minimum, was a year-to-year oral contract** (Complaint, Para-

graphs 16 and 20). Respondent has simply claimed that Employment Contracts not specifying a definite duration of employment are presumed to be terminable at will {*Slonaker v. P.G. Publishing Co.* 338 Pa. 292, 13 A.2d 48 (1940)}. Petitioner, however, may overcome the at will presumption by showing the intent of the parties that the contract last some definite period of time OR for a reasonable period of time OR by showing that Plaintiff gave consideration to Defendant in addition to the employee's normal services, such as sacrificing other employment opportunities {*McNulty v. Borden, Inc*: 474 F.Supp. iii (E.D., Pa. 1979), (per Pennsylvania law)}.

2. Petitioner overcame the at-will presumption by showing the intent of the parties that contract last a definite period of time; in accordance with a Supreme Court of Pennsylvania rule based on *Slonaker v. P.G. Publishing Co.* 338 Pa.-292, 296, 13 A.2d 48 (1940); *Lubrecht v. Laurel Stripping Co.* 387 Pa. 393, 396, 127 A.2d 687 (1956). Also: *Weidman v. United Cigar Stores, Co.* 223 Pa. 160, 161, 72 A.2d 377 (1909) {*Gillian v. Consolidated Foods Corp.* 424 Pa. 407, 227 A.2d 858 (1967)}.

Petitioner has supported his allegation by presenting documentation in annual benefit programs for salaried employee; in Annual Reports and a Career Planning & appraisal guide which were given him by the Respondent during negotiations relevant to undertaking employment with Defendant (Plaintiff's Affidavit and Defendant's Dep. Exhibits 2,3 and 4). Further, Respondent's intent to enter a year-to-year agreement was implied through the offer and payment of an *annual* salary, *annual* salary increases, *annual* employee reviews and *annual* objectives for employees. (Plaintiff's Affidavit, Paragraph 4). As further evidence of intent of demonstrating the existence of this minimal year- to-year employment contract,

Petitioner enumerated specific guaranteed and provided to him and quoted on a yearly basis. Such benefits include guaranteed income upon retirement based on annual salary calculations; *annual* vacation and holidays; life and travel insurance based upon a multiple of annual salary; medical and dental coverage with an annual value of about $1,500.00; a company savings and stock ownership plan worth up to about

$3,500.00 annually; unemployment insurance valued annually; Social security at the rate of $2,170.00 annually, a matching gifts plan worth about $3,000.00 annually and an employee shareholder plan worth about $220.00 annually. Air Products valued this added income to be worth about $6,757.00 in 1979 and $10,020.00 in 1982. (Plaintiff's Affidavit, Para 3 and 4).

The Respondent has relied heavily on the Ex Post Facto reasoning of a holding in *Darlington v. General Electric* . Pa. Super. 504 A.2d 306, 307 (1986). This was an questionable choice. First, because in *Darlington, supra the jury found in favor of the plaintiff* (Overturned by Superior Court); and that cases *was* allowed to go to a jury. In that the ruling in that case came after presentation of the extant case it should not have considered here because it was an ex-post facto decision (U.S. Constitution, Preamble & 7th Amendment}. Second, unlike the *Darlington* case, here the Petitioner did not rely upon vague or indefinite promises, but offers numerous documents and statements as supporting evidence), and provides proof of the Respondent's year-to-year commitment. The trial court therefore erred in using the case to block a jury trial.

3. **Petitioner overcame the at-will presumption by showing that he gave his employer consideration other than services for which he was hired** {*Lucacher v. Kerson* 158 Pa.Super. 437, 45 A.2d 245 (1946)}. When Plaintiff gives sufficient additional consideration, such as giving additional consideration when he undergoes a substantial hardship other than the services which he is hired to perform, courts infer that the parties intended that the contract will not be terminable at will {*Huguet v. Food Sales, Inc.* 19 Pa. D&C.3d 376 (1980); again *Darlington*, supra at Pa.Super. 504 A.2d at 314, 315}.

Here the Petitioner has offered proof of additional facts and circumstances well beyond the quotation of annual salary that could support the jury's finding that the contract had some minimal fixed duration. Unlike many newly hired employees that come from school or are not employed when hired, the Petitioner had to make considerable sacrifice in consideration of the Respondent's demands.

During 1977, Petitioner remained gainfully employed by Corning Glass, earning more than $20,000 per year, plus

$98.00 for each day's service with the Army Reserve. He maintained an excellent record with both, and thus assured a secure future. Based upon an outstanding educational, military and employment background, Respondent induced him to seek a career with Air Products. (Plaintiff's Affidavit, Paragraph 8). During the initial interviews, Petitioner brought along a sample career progression chart from his current employer, obviously seeking to explore career opportunities (Plaintiff's Dep. p. 84). The Respondent certainly understood this because it produced a series of organizational charts for Air Products and discussed long-term objectives and positions which offer Plaintiff in his future with Air Products. (Plaintiff's response to Defendant' s Request For Documents).

After the interviews, Respondent made a written offer of employment May 4, 1979 to Petitioner (Defendant's Dep. Exhibit No. 2), promising "excellent opportunities for continued career growth and development" at Air Products. (Defendant's Dep. Exhibit No. 2). These words were deliberately placed in the letter pursuant to the interviews and to entice the the Petitioner, allegedly to make him give up a secure career and family life in West Virginia.

Due to Respondent's perseverance, Petitioner finally consented to give up school, leave current employment, discontinue military service, uproot his family, and relocate to Allentown, Pennsylvania for the promised career position with Air Products. (Plaintiff's Affidavit Paragraph 8, 10, 11; Defendant's Dep. Exhibit No. 3; and Plaintiff's Dep. p.64 L21-23). The Statement of The Case has enumerated other specific sacrifices made by the Respondent; all of which have been denigrated by the trial court, perhaps based on unwarranted presumptions by the Trial Court.

Would any reasonable man give up a career position and make all the other sacrifices listed to accept some tentative work, over 400 miles away from his home? Would he subject his family to such hardship? Contrary to the information and character description provided, the trial court has decided that the Petitioner would take such unreasonable action, and used this as a basis to deny due process. Therefore, given the additional facts and circumstances, apart from the quotation

of annual salary, the trial court erred in interpreting the nature of the agreement and the parties involved.

4. Pennsylvania case law provides that a court could infer that an employment contract is not terminable at will if employee gives additional consideration.

a. In *O'Neill v. ARA Services, Inc.* 457 F.Supp. 182 (1978), the defendant, plaintiff's former employer, contended that plaintiff's complaint failed to state a cause of action for breach of contract because the oral employment agreement did not specify employment or a definite time period. Plaintiff, O'Neill alleged that he left his former employment and worked for ARA for two years in reliance on the defendant's promise that he would be transferred to a management position after two years; and alleged other assurances under the oral agreement such as promises of a specific rate of pay and an official title. The court noted that "[i]f these allegations were established at trial, it would not be unreasonable for a trier of fact to conclude that the parties intended plaintiff's employment in management to extend for a reasonable time." The court therefore refused to grant the motion to dismiss "without giving [plaintiff] an opportunity to prove the existence of facts and circumstances which together may show a definite employment contract" {*O'Neill* at 186}.

b. In *Vogue v: National Rolling Mills* 72 Pa. D.&D.2d 335 (1974), the Court on a motion for a new trial found that there were additional facts and circumstances present apart from the quotation of annual remuneration that could have supported the jury's finding that the contract was for a fixed duration. Specifically, the plaintiff, Vogue, had resigned from a position in another state and moved his family to Pennsylvania to work for Defendant. Discussions between the parties as to bonuses were based on annual salary figures, the position in question was in management and there was a three-month probationary period involved. Upon reviewing the case during consideration of Defendant's Preliminary Objections, the trial court found that the allegations in the instant case are comparable to those of the Plaintiff's in those cases.

The court cited Defendant's recruitment of Plaintiff while working for another employer in a different state,

Defendant's various promises and assurances relative to promotion and a yearly salary based on yearly objective performance reviews, and Plaintiff's resignation from his job out of state and moving to Allentown after accepting Defendant's offer of employment. (Appendix A). The Court found that, like the Plaintiff in Vogue, the position of Plaintiff herein was a responsible one with a substantial salary. It is thus possible that the trier of fact could conclude that the parties intended Plaintiff's employment to be at least for a reasonable time.

5. The termination of the terms of a disputed oral contract pursuant to the parties intention, as in this case, is the exclusive function of a jury as a question of fact {*McCormack V. Jermyn* 351 Pa. d61, 40 A.2d 477 (1945)}. Here, the trial court decided as a matter of law that it was able to determine the intentions of the two parties; and that they did not intend that the employment should last for some definite duration. Here the court had neither the ability to perceive the depth of intent nor authority discount its existence.

Upon the Evidence offered by Petitioner under the facts as alleged, it is also possible that a trier of facts could conclude that the parties intended the employment term - as a minimum - on a year-to-year basis. As demonstrated this case far from being free of doubt and therefore Summary Judgment was not appropriate {*Weiss v.Keystone Mack Sales, Inc., supra*} Determination of the terms of the disputed oral contract pursuant to the parties intention is the exclusive function of the finder of fact {*McCormack v. Jermyn: supra*}.

6. A promise which the promisor should reasonably expect to induce action or forbearance is binding if the injustice cam be avoided only by enforcement of the promise {*Murphy and Slota v Burke* 454 Pa. 391, 311 A.2d 904 (1973)}. Petitioner incorporates herein his arguments set forth in the preceding sections as if fully set forth at length.

The allegation been well demonstrated that **the Respondent promised nothing less than than career position at Air Products.** He aggresively recruited the Petitioner; making an increased offer when the original was rejected; and making various written and oral promises or representations about the duration of employment, as aforesaid. Respondent thus prom-

ised a career position, **and the Petitioner justifiably relied upon these promises of a career position.** As described, he quit a career positions, terminated graduate studies, abandoned a position in the Army Reserve, incurred substantial losses of real property, increased tax liabilities, and uprooted his family, as aforesaid. Petitioner made these sacrifices in justifiable reliance upon promises of nothing less than career with Air Products. Respondent had ample opportunity to dispel any false impressions. This clearly it did not do. On the contrary, even as the Petitioner moved in, the Respondent assured the mortgagor of an "excellent" probability of continued employment.

As aforesaid, Respondent **should reasonably have expected to induce Plaintiff's reliance upon its promise.** He not only reasonably expected Petitioner's s aforesaid reliance, but intentionally made the aforesaid promises for the purpose of inducing this expected action. Nor has it been denied that the aforesaid recruitment and representations to Plaintiff were calculated to obtain Petitioner as an employee, thus necessitating the aforesaid sacrifices.

Injustice can be avoided only by enforcement of said promises. Given that all the Petitioner allegations had been accepted as true, the position of the trial court is in error.

II. The Trial Court erred as a matter of Law in sustainining the defendant's preliminary objections and demmurrers to the complaint where the Petitioner pleaded a cause of action indicating that the Respondent breached a Covenant of Good Faith Dealing In Employment Contracts.

Count Three of the Petitioner's Complaint states a claim for damages based upon Respondent's breach of an implied covenant of good faith and fair dealing in his employment contract.

A number of courts have held that employers are liable in contract when they discharge "at-will" employees in violation of an implied covenant of good faith and fair dealing which thecourts imposed upon the employment contracts for public policy reason {*12 A.L.R.* 4th, 560, 6a (1982); *Clearly v. American Airlines, Inc.* 111 Cal. App.3d 443 (1980); *Fortune v. National*

Cash Register Co. 373 Mass 96, 364 N.E.2d 1251 (1977) and *Gram v. Liberty Mutual Insurance Co.* 429 N.E.2d 21; Sup.Judj.Ct. Mass (1981)}.

The trial judge wrote that he knows of no Pennsylvania case permitting recovery on the basis of "implied covenants of good faith or fair dealing" {Appendix A, p 6). He then goes on to say that Federal cases considering the issue are to the contrary {*Novosel v. Nationwide Insurance Co.*, 721 F.2d 894 (3d Cir. 1983)}; but expresses the view that a Pennsylvania case is more pertinent, and sustains the demurrer to Count 2. Using this line of reasoning, it seems that the Commonwealth of Pennsylvania could reject any portion of Constitutional Law not specifically argued within the State Court system, and could ignore such law indefinitely by refusing to hear cases. Perhaps even forms of slavery could be condoned under the pretext that they had not been defined narrowly enough to be permitted as a cause of action. Clearly when there is such conflict it balances in favor of the United States {*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 3216 (1819) 4 L.Ed. 579}.

For public policy reasons, Pennsylvania courts have a responsibility to impose upon employment contracts a similar implied covenant of good faith and a standard for fair dealing. Under this count, it is argued that even if all the well documented arguments regarding breach of contract and breach of promise are put aside, the Respondent still had a responsibility to act in good faith in terminating Petitioner's employment. Hence, the Respondent's Preliminary Objections to Count Two of the Complaint should have been dismissed without merit. .

Contrary to statements of the trial court there is a great number of laws and statutes that specify the nature of "fair dealing" required by the the Constitution. The Civil Right Act (1964 as amended in 1974) is perhaps the most prominent of law of this kind and would also apply here. Although the Petitioner is a Catholic of European Origin he chose not to bring action under the pertinent portion of the Civil Rights Act forbidding discrimination based on Religion and National Origin. This is not because discrimination did not take place; by definition it has.

Moreover, although the Respondednt refused to an-

swer Interrogatories concerning the affiliations of the board of directors, it is clear that they were (1982) all white, all male, and disproportionately Anglo-Saxon Protestant. The reason is that this Act was not invoked until now is that the Constitution, of both the Commonwealth and the United States, was considered to apply without requiring specificity; i.e., the whole purpose of the Constitution centered on guaranteeing Civil Rights. This principle was expressed by Chief Justice Marshall as follows: "That the people have an original right to establish, for their future government, such principles, as in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent." {*Marbury v Madison*, 5 U.S. (1 Cr.) 137 (1803)}. The issue here warrants a formal review by a higher court.

Under the unique interpretation of the trial court, Air Products - a bloodless legal entity, of a character not described in the Constitution - is held to have even greater rights than the Petitioner. And by whom was it endowned with these rights? Not the Commonwealth for it has no authority to circumvent the Law of the Land. Apparently the trial court has acted on its own to - if not endow - then to condone the assumption of superlegal rights by this multinational creature. To the extent that the Superior Courts have refused to hear the case, it appears that they support this usurpation of power.

The reasoning in this case can be applied from the original "common carrier" cases of the latter part of the 19th Century. As the original railroads were created to serve the public, so also the Multinational Corporations were created to conduct international business. Both institutions were granted a number of priveleges to facilitate their service to the public. In neither case was a violation of individual rights included among those privileges. In *New York Central Railroad. Co v. Lockwood,* U.S. Supreme Court, 84 U.S. (17 Wall.) 357 (1873); the Railroad attempted to circumvent certain "basic duties". In the opinion of Justice Bradley:

"The carrier and his customer do not stand on a footing

of equality. The later is only one individual of a million. He cannot adfford to haggle or stand out and seek redress in the courts. His business will not permit such a course."

Similarly the non-union employee of a multinational corporation, after he negotiates and accepts a position, also does not stand on an equal footing with a creation whose domain extends beyond national borders with an income often in excess that of entire countries. This creation has access to employees from around the world and can purchase legal expertise, far beyond the grasp of a private citizen. The employee, once deprived of a livelihood, can hardly wage an equal battle in defense of his Constitutional Rights.

The 14th Amendment to the U.S. Constitution requires thayt we must bind this Multinational Corporation to keep its promises and behave according to some minimal standard of good faith and fair dealing. It only seems logical that this standard be determined from the Law of the Land in which the entity originates, and not to the arbitrary pronouncements of local judges. Such a standard would hardly be hard to impose or regulate because it already amply stated in the U.S Constitution. If individual States are subsevient to the Law of the Land, it seems grotesquely inconsistent to allow undemocratic structures of Commerce to enjoy free reign over the lives of individual citizens. At the very least it seems that the individual should be insured against arbitrary harm from such an entity and not be forced to leave its non-democratic domain in a worse condition then when he joined it.

Under provision of the Employment and Income Security Act of 1974 it is also clear that there is a standard of good faith and fair dealing that has been imposed on the Corporation. It is obviously profitable for a business to confiscate the pension funds of employees before they are fully vested. Congress decided to impose a specific limit for vesting funds, but the spirit of the law was aimed at insuring a standard of good faith and fair dealing. The Preamble of the Constition binds local judges to act within such intentions.

III. The Trial Court erred as a matter of law in sustaining the Respondent's Demurrer to the Complaint where

the Petitioner indicated a cause of action for retaliatory termination of his employment, because he exercised his constitutional right to free speech and his contractual obligation to monitor safety practices of this employer.

In that the issue of good faith and fair dealing is directly related to Public Policy, Petitioner incorporates herein arguments set forth in Section II as if fully set forth at length.

1. Even assuming arguendo, that there was only an at-will employment contract, if Petitioner can show that his discharge violated a clear and significant public policy, a cause of cause of action for wrongful discharge does lie {*O'Neill v. ARA Services, Inc.*, supra; *Philips v. Babcock & Wilcox Tubular Products, Division of McDermott, Inc.* Pa. Super.__503 A.2d 36 (1986); *Darlington v. General Electric*, supra; *Geary v. United States Steel Corporation* 456 Pa. 171, 319 A.2d 174 (1974). Any contract, including contract at will, which is terminated for a reason contrary to the public policy of Pennsylvania gives rise to a claim for breach of contract {*McGinley v. Burroughs Corporation* 407 F.Supp. 903, 911 (E.D., Pa. (1975)}.

2. An employer may not discharge an employee for exercising his rights to free speech {*Novosel v. Nationwide Insurance Co.* 721 F.2d 894 3d Cir, (1983)}. Pennsylvania has a clear and substantial state public policy forbidding retaliatory termination of employment based upon an employee's exercise of his right to free speech and his contractual obligation to monitor safety practices of his employer {Article I, Section 7 of the Constitution of Pennsylvania and the First Amendment to the United States Constitution; and *Novosel v. Nationwide Insurance Co.*, supra}.

The Supreme Court of Pennsylvania has stated that an employer may not intrude upon an employee's constitutional rights by virtue of the employer's discharge as follows: "...there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly when some recognized facet of public policy is threatened. The notion that substantive due process elevates an employer's privilege of luring and discharging employees to an absolute constitutional

right has long since been discredited..." {*Geary v. United States Steel Corporation* 456 Pa. 171, 184-185, 319 A.2d 174, 180 (1974)}. Here the Petitioner claims that he was discharged based upon Petitioner's insistence on careful attention to detail in cost estimating for the construction of new, and existing plants, and for his efforts to improve the safety at various Air Product facilities (Complaint, Paragraphs 45, 46 and 47).

Petitioner claims that certain recommendations would cost large sums of money, thus reducing Respondent's profits (Plaintiff's Affidavit, Paragraph 28).

In granting Respondent's Preliminary Objections to Plaintiff's claim for wrongful discharge in violation of public policy, the trial court cited a case where the discharged employees had antagonized their employers regarding safety issues. Here, there is not even claim that the Petitioner made a nuisance of himself. Instead, Respondent attempts to cover up its retaliatory termination by claiming that the discharge was due to economic factors in accordance with general layoffs. In actual fact, the alleged economic decline justification for the discharge was a sham. The company had recently grown by more than 20% in personnel; outside hiring of employees continued, employees with less seniority and fewer qualifications were retained {Plaintiff's Affidavit, Paragraphs 28 and 29). There was no counseling or suggestion of poor performance. At the time of discharge Respondent refused to even offer a single position in the dozen different departments in which Petitioner sought work. (Plaintiff's Affidavit, Paragraph 28). Defendant refused to leave open a possibility of recall, or of any type of future re-employment at any salary (Plaintiff's Affidavit, paragraph 28; Plaintiff's Dep. p. 36-39).

Taking as true and well-pleaded material facts as set fort in Plaintiff's Complaint, as well as all inferences reasonably deductible thereupon, Petitioner stated a cause of action for wrongful discharge. At very least, doubt concerning the validity of Defendant's Preliminary Objections ought to have been resolved in favor of Petitioner {*Clouser v. Shamokin Packaging Co.* 240 Pa.Super. 268, 273-74, 361 A.2d 836, 839-40 (1976)}.

CONCLUSION

This case strikes at the very heart of the Constitutional form of government. The Respondent has attempted to hide behind a facade of Free Enterprise and Due Process, to cover up activities in direct contrast to Equal Opportunity and Justice.

There are values here reaching even beyond this country's history; to legal principles set forth in English Common Law during the 14th Century. The *Magna Carta* simply put forth the central principle that is here questioned:

"No freeman shall be taken, ... or in any other way destroyed... except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny or delay, right or justice."

Has this country allowed the oppressive monarch's of old to be replaced by the strong arm of insensitive multinational corporations. Here the life of the Petitioner and his family has been destroyed by an unfair and arbitrary business giant. Even if he had been granted a successful day in court, the responsible directors of this enterprise would probably have escaped accountability. To be denied a jury trial, in clear contravention of the seventh amendment, hardly seems a likely way to foster responsible behavior among those who control the nation's economy. Or is this the New Order?.

The Petitioner has set forth the reasons that he believes the Respondent has breached a contract, broken his promises, generally failed to deal in good faith, and not met its obligation in terms of safety practices. It is therefore requested that this honorable Court grant Certiorari.

Respectfully submitted,

W. Victor Madej, *pro se*
September 19, 1988

APPENDICES: OPINIONS AND ORDERS

A.

COURT OF COMMON PLEAS OF LEHIGH COUNTY

CIVIL ACTION- LAW

W. VICTOR MADEJ, Plaintiff v. AIR PRODUCTS AND CHEMICALS, INC., Defendant {No. 84-C-1960

***

ORDER

NOW, this **6 day of December, 1985**, after argument and for the reason expressed in the accompanying opinion,

IT IS ORDERED that the defendant's demurrer to Counts I and III is denied.

IT IS FURTHER ORDERED that defendant's demurrer to Counts II and IV is sustained. AND IT IS FURTHER ORDERED that defendant shall file answer within twenty (20) days from the date of this order.

BY THE COURT :
JOHN E. BACKENSTOE, P.J.

B.

COURT OF COMMON PLEAS OF LEHIGH COUNTY

CIVIL ACTION- LAW

W. VICTOR MADEJ, Plaintiff v. AIR PRODUCTS AND CHEMICALS, INC., Defendant {No. 84-C-1960

***

ORDER

AND NOW, this **10 day of December, 1986**, upon consideration of the motion for summary judgement filed by the defendant , Air Products and Chemicals, Inc., and after oral argument on the matter,

IT IS HEREBY ORDERED that said motion is GRANTED.

BY THE COURT :
JOHN E. BACKENSTOE, P.J.

C.

COURT OF COMMON PLEAS OF LEHIGH COUNTY

CIVIL ACTION- LAW

W. VICTOR MADEJ, Plaintiff v. AIR PRODUCTS AND CHEMICALS, INC., Defendant {No. 84-C-1960

***

APPEARANCES:

CHARLES R. OSINSKI, ESQUIRE On behalf of the Plaintiff

Steven A. Bergstein, Esquire, with him FRANK, FRANK and PENN, and RICHARD H. ALBERT, ESQUIRE,

On behalf of the Defendant.

***

OPINION

JOHN E. BACKENSTOE, P.J.

Before us are the preliminary objections of defendant Air Products and Chemicals, Inc. to plaintiff's complaint to which it has demurred to all four counts. For the following reasons, the demurrer to counts II and IV is sustained.

We are mindful that in ruling upon a demurrer, the court must assume that all factual averments in the complaint and all reasonable inferences therefrom are true. Savitz v.Weinstein, 395 Pa. 173, 149 A.2d 110 (1959). Moreover, to sustain preliminary objections in the nature of a demurrer, it must clearly appear that, upon the facts averred, the law: will not permit a recovery. Pike County Hotels Corp. v. Kiefer, 262 Pa.Super, 126, 396 A.2d 677 (1978). With these guidelines in view, we turn to the facts alleged in this case.

The complaint alleges that plaintiff was employed in 1979 as an engineer with a corporation in West Virginia when he was recruited for possible employment by defendant. Pursuant (allegedly) to promises of rapid advancement and excellent opportunity, Plaintiff resigned from his job and accepted defendant's offer to work as a cost engineer at an annual salary starting at $24,000.00 per year. Thereafter, defendant relocated to Lehigh County where he began working for defendant in June of 1979. Plaintiff received yearly salary increases in June of 1980, 1981 and 1982, the latest of which was based on his promotion to Senior Cost Engineer. In August 1982, defendant notified plaintiff that he was to be terminated effective November 12, 1982. After his termination, plaintiff received eight weeks severance pay, but he was unable to secure other employment until June 1983.

In bringing this action, plaintiff has raised four counts in his complaint. Count I is based on the breach of an alleged oral year to year employment contract. Count II alleges that by its termination of plaintiff without good cause, defendant breached its implied covenant of good faith and fair dealing in its employment contract with Plaintiff. Count III is based on the doctrine of promissory estoppel while Count IV essentially alleges that the termination was a wrongful discharge because it violated public policy.

As a basis for its demurrer to Count I, defendant asserts that the said count alleges employment for an indefinite period which, under Pennsylvania law, raises the presumption that the contract was terminable at the will of either party. That an employment contract not specifying a definite duration of employment is presumed to be terminable at will is well established in this Commonwealth. Slonaker v. p.G. Publishing Co., 338 Pa. 292, 13 A.2d (1940). The plaintiff may overcome this presumption by showing the intent of the parties that the contract last for some definite period of time or for a reasonable time or by showing that the plaintiff employee gave consideration to the defendant-employer in addition to the employee's normal services, such as sacrificing other employment opportunities. McNulty v. Borden, Inc., 474 F.Supp. 1111 (E.D. Pa. 1979), (applying Pennsylvania law). Contrary to defendant's assertion, plaintiff asserts that Count I clearly alleges in paragraphs 16 and 20 that the subject employment was under an oral agreement on a year to year basis. In support of this claim, plaintiff alleges that he was to be paid an annual salary and that he thereafter received yearly salary increases in June of 1980, 1981 and 1982. In response, defendant cites Trainer v. Laird, 320 Pa. 414, 183 A.40 (1936) for the proposition that no presumption arises that the hiring of an employee was for a fixed period even where the hiring was for compensation computed at so much per day, week, month, quarter or year. This is so because the agreed upon figure merely fixes the rate of compensation for the time of employment. Id. at 416, 183 A. at 41. Nevertheless, the Supreme Court has also stated the following rule:

> ... [I]n determining whether an employment contract is for a definite term,: '... it is the intention of the parties which is the ultimate guide, and, in order to ascertain that intention, the court may take, into consideration the surrounding circumstances, the situation of th parties, the objects they apparently have in view, and the nature of the subject matter of the agreement.' Slonaker v. P.G. Publishing Co., 338 Pa. 292, 296, 13 A.2d 48 (1940); Lubrecht v. Laurel Stripping Co., 387 Pa. 393, 396, 127 A.2d 687 (1956). See also:

Weidman v. United Cigar Stores, Co., 223 Pa. 160, 161, 72 A. 377 (1909).

Gillian v. Consolidated Foods Corp., 424 Pa. 407, 227 A.2d 858 (1967). The determination of the terms of a disputed oral contract pursuant to the parties' intention is the exclusive function of the jury as a question of fact. McCormack v. Jermyn, 351 Pa. 161, 40 A.2d 477 (1945). In O'Neill v. ARA Services, Inc., 457 F.Supp. 182 (. 978), the defendant's (plaintiff's former employer) contended that plaintiff's complaint failed to state a cause of action for breach of contract because the oral employment agreement did not specify employment for a definite time period and as such was terminable at will by either party for any reason. Plaintiff O'Neill alleged that he left his former employment and worked for ARA for two years in reliance on the promise that he would be transferred to a management position after two years. He also alleged other assurances under the oral agreement such as promises of a specific rate of pay and an official title. The court noted that "[i]f these allegations were established at trial, it would not be unreasonable for a trier of fact to conclude that the parties intended plaintiff's employment in management to extend for a reasonable time." O'Neill at 185. The court refused to grant the motion to dismiss "without giving [plaintiff] an opportunity to prove the existence of facts and circumstances which together may show a definite employment contract." O'Neill at 186. Similarly, in Vogue v. National Rolling Mills, 72 Pa.D.&D.2d 335 (1974), the court on a motion for a new trial found that there were additional facts and circumstances present apart from the quotation of annual remuneration that could have supported the jury's finding that the contract was for a fixed duration. Specifically the plaintiff Vogue had resigned from a position in another state and moved his family to Pennsylvania to work for defendant. Discussions between the parties as to bonuses were based on annual salary figures, the position in question was in management and there was a three-month probationary period involved.

The allegations in the instant case are comparable to those of the plaintiffs in O'Neill and Vogue. The plaintiff herein alleges that he was recruited by defendant while working for another employer in a different state. He alleges various promises and assurances relative to promotion and a yearly salary based on yearly objective performance reviews. Plaintiff further avers that he resigned from his job out of state and moved to Allentown after accepting defendant's offer of employment. Like the plaintiff in Vogue, the position of plaintiff herein was a responsible one with a substantial salary. If these allegations are established at trial, it is possible that the trier of fact could conclude that the parties intended plaintiff's employment to be on a

year to year basis. Accordingly, the demurrer to Count I is denied because in our view the plaintiff should have the opportunity to prove the existence of facts and circumstances which together may show a definite employment contract.

In support of its demurrer to Count II, defendant argues that there is no cause of action at present in Pennsylvania for breach of an implied covenant of good faith and fair dealing in an employment contract. The courts of a number of other states have held that employers could be liable in contract where they discharged "at-will" employees in violation of a implied covenant of good faith and fair dealing which the courts imposed upon the employment contracts for reasons of public policy. Annot. 12 A.L.R. 4th, 560, §sa (1982) (and cases cited therein). Nonetheless, neither the research of the parties herein nor ours has disclosed any Pennsylvania cases whatsoever permitting such a cause of action. Federal cases considering the issue are to the contrary. For example, in Novosel v. Nationwide Insurance Co., 721 F.2d 894 (3d Cir. 1983) (applying Pennsylvania law), the court noted the absence of any state cases on the Subject and refused to fashion a common law just cause standard that would be based primarily on the critical treatment afforded to "at-will" discharges by legal commentators. Even more to the point is Wolk v. Saks Fifth Avenue, Inc., 728 F.2d 221, 225 (3d Cir. 1984) (applying Pennsylvania law) wherein the court affirmed a dismissal of a similar claim and noted that "there is no indication that the Pennsylvania courts have as yet fashioned or indicated their intention to fashion a uniform just cause required for all discharges." Based on our view that no cause of action exists in Pennsylvania for breach of an implied covenant of good faith and fair dealing in employment contracts, we are constrained to sustain the demurrer to Count II.

By its demurrer to Count III of the complaint, defendant argues that plaintiff has failed to state a cause of action based on promissory estoppel. Our Supreme Court has recognized that a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Murphy and Slota v. Burke, 454 Pa. 391, 311 A.2d 904 (1973); accord, DiSante v. Russ Financial Co,, 251 Pa.Super. 184, 380 A.2d 439 (1977). The basis of defendant's demurrer is the assertion that plaintiff has failed to allege a specific promise of employment for a definite time on which he relied. It is clear that the doctrine of promissory estoppel is restricted to cases where a promise is made. Fried v. Fisher, 328 Pa. 497, 196 A. 39 (1938). Paragraph No. 5 of the complaint alleges that during defendant's recruitment of plaintiff, the former promised "ear-

ly responsibility, rapid advancement, and excellent opportunities for continued personal career growth and development at Air Products." Paragraph No. 37 alleges that plaintiff was promised continuing career opportunities, that defendant would implement a computerized career profile system, that defendant would use techniques of management by objective and that there were assurances of promotion and job security. We believe that the alleged promises are clear enough so that defendant is aware of the charges against it and is thus able to formulate a defense. The case of Charles v. Crestview Properties, 15 Pa. D.&C.2d 568, 71 Dauph. at 172 (1959) supports our decision. In Charles, the court said that "[t]o set forth the exact words of the [oral] promises would be to require plaintiffs to definitely plead their evidence. This they need not do." Charles, 15 Pa.D.&,.2d at 570, 71 Dauph. at 174. Plaintiff has alleged several promises which he contends induced him to action of a definite and substantial character. In our view the said allegations sufficiently state a cause of action to reserve the decision on this issue for the trial judge after hearing the evidence. Accordingly, the demurrer to Count III is denied.

Lastly, defendant has demurred to Count IV of the complaint which alleges that plaintiff's discharge constitutes a violation of public policy. Although the general rule in Pennsylvania is that employment contracts not specifying a specific duration of the relationship are presumed terminable at will, Slonaker, supra, dicta from the Supreme Court's decision in Geary v. United States Steel Corporation, 456 Pa. 171, 319 A.2d 174 (1974) has been interpreted to mean that a plaintiff who was an "at-will" employee may have a cause of action for wrongful discharge but only where the employer is motivated by a specific intent to cause harm to the employee or where a clear mandate of public policy is violated by the discharge. O'Neill, supra. Notwithstanding the recognition that such a cause of action exists, several courts have emphasized that the so-called public policy exception is extremely narrow. See Boresen v. Rohm & Haas, Inc., 526 F.Supp. 1230 (E.D. Pa. 1980) affirmed 723 F.2d 1445 (applying Pennsylvania law); Yaindl v. Ingersoll-Rand Co., 281 Pa.Super. 560, 422 A.2d 611 (1980). The Superior Court in Yaindl attempted tn provide an analytical framework work for determining whether the factual allegations in an employee's complaint are sufficient to state a cause of action by holding that the court

> must weigh several factors, balancing against the [employee's] interest in making a living, his employer's interest in running its business, its motives of discharging [the employee] and its manner of effecting the discharge, and any social interests or public policies that may be implicated in the discharge.

Yaindl, 281 Pa.Super. at 577, 422 A.2d at 620. More recently, the Su-

perior court modified this balancing test by suggesting a two prong test of first discerning whether any public policy is threatened by the discharge and second, considering that even when an important public policy is involved, an employer may discharge an employee if he has separate, plausible and legitimate reasons for doing so. Cisco v. United Parcel Services, Inc., 328 Pa.Super. 300, 476 A.2d 1340 (1984).

In the instant case, plaintiff alleges that he was never given the actual reason for his termination but he avers that it resulted from "his outspokeness and careful attention on the issues of safety in cost estimating for the construction of new plants and existing plants" as well as "his efforts for improving the safety at various Air Products facilities [which] were ignored in the interests of lower costs."[1] Moreover, plaintiff "alleges that his failure to `buckle under' in the name of lower estimates and misdirected teamwork infuriated his superiors and led to his termination."[2]

Several cases are similar factually to the instant case and are thus helpful in working through the Cisco analysis. For example, the plaintiff in Geary alleged that the defendant company had wrongfully discharged him because he had complained to high company officials that the company's product was unsafe and constituted a serious danger to potential users. The Supreme Court affirmed the dismissal of plaintiff's complaint. Geary, supra. The court said the following:

> The most natural inference from the chain of events recited in the complaint is that Geary had made a nuisance of himself, and the company had discharged him to preserve administrative order in its own house ...The praiseworthiness of Geary's motives does not detract from the company's legitimate interest in preserving its normal operational procedures from disruption. In sum while we agree that employees should be encouraged to express their educated views on the quality of their employer's products, we are not persuaded that creating a new non-statutory cause of action of the sort proposed by appellant; is the best way to achieve this result. On balance, whatever public policy imperatives can be discerned here seem to militate against such a course. Geary v. United States Steel Corp., 456 Pa. at 183; 319 A.2d at 180.

Similarly, in Yaindl v Ingersoll-Rand Co., 281 Pa.Super. 560, 422 A.2d 611 (1980), the plaintiff-employee's criticism of the manufacturing process of his employer apparently antagonized one of his superiors to the point that plaintiff was ultimately discharged, allegedly without cause. for pointing out safety hazards, the Superior Court affirmed the granting of summary judgment to the defendant-employer.

1. Complaint - paragraphs 45 and 46
2. Complaint - paragraph 47

The court noted that no clear public policy was threatened by the plaintiff's discharge. Id . at 580, 422 A.2d at 621.

Finally, in Adams v. Budd Co., 583 F.Supp. 711 (E,D. Pa. 1984) (applying Pennsylvania law), the plaintiff-employee was discharged after pointing out numerous defects in the rail cars manufactured by his employer and in so doing antagonized his immediate supervisor. In granting summary judgment to the defendant-employer, the court noted that "Pennsylvania does not . ·cognize a public policy exception for pointing out defects in a company product..." Adams at 716.

Accordingly, since it appears clear that a termination for pointing out safety hazards concerning one's employer or its products is not a violation of public policy, we are compelled to hold that Count IV of the instant complaint fails to state a cause of action. The demurrer to Count IV is sustained.

COURT OF COMMON PLEAS OF LEHIGH COUNTY

CIVIL ACTION- LAW

W. VICTOR MADEJ, Plaintiff v. AIR PRODUCTS AND CHEMICALS, INC., Defendant {No. 84-C-1960

****

APPEARANCES:

CHARLES R. OSINSKI, ESQUIRE
On behalf of the Plaintiff

STEVEN A. BERGSTEIN, ESQUIRE, with him FRANK, FRANK, PENN, & BERGSTEIN, P.C. and RICHARD H. ALBERT, ESQUIRE,
On behalf of the Defendant.

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OPINION

JOHN E. BACKENSTOE, P.J.

Before this court is the defendant's motion for summary judgment. For the reasons discussed herein, we grant the defendant's motion.

Summary judgment may only be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa. R.C.P. 1035(b). On a motion for summary judgment, the court must not decide any issues of fact. Its sole

function is to determine whether there are any genuine issues of fact to be tried. Thorsen v. Iron and Glass Bank, 328 Pa. Super. 135, 141, 476 A.2d 928, 931 (1984); Weiss v. Keystone Mack Sales, Inc., 310 Pa. Super. 425, 430, 456 A.2d 1009, 1011 (1983). In considering a motion for summary judgment, the court must examine the record in the light most favorable to the party opposing the motion, resolving all doubts as to the existence of genuine issues of material fact in favor of the non-moving party. Mattia v. Employers Mutual Companies, 294 Pa. Super. 577, 579, 440 A.2d 616, 617 (1982); Lehigh Electric Products Co. V. Pa. Nat. Mutl Casualty Ins. Co., 257 Pa. Super. 198, 203, 390 A.2d 781, 783 (1978). A summary judgment should only be granted where the case is clear and free from doubt. Weiss, supra, at 430, 456 A.2d at 1011, Chorba v. Davlisa Enterprises, Inc., 303 Pa. Super, 497, 500, 450 A.2d 36, 38 (1982). With these guidelines in mind, we turn to the facts alleged in this case.

Plaintiff, W. Victor Madej, was employed in 1979 as an engineer with a corporation in West Virginia when he was recruited for possible employment by the Defendant, Air Products and Chemicals, Inc. According to the plaintiff, he resigned his job and accepted defendant's offer to work as a cost engineer at an annual salary starting at $24,000.00 per year pursuant to promises of rapid advancement and excellent opportunity. Thereafter, the defendant relocated to Lehigh County where he began working for the defendant in June of 1979. The plaintiff received yearly annual salary increases in June of 1980, 1981 and 1982, the latest of which was based on his promotion to Senior Cost Engineer. In August of 1982, the defendant notified the plaintiff that he was to be terminated effective November 12, 1982. After his termination, the plaintiff received eight weeks severance pay, but he was unable to secure other employment until June of 1983.

A four count complaint was subsequently filed by the plaintiff against the defendant. On December 6, 1985, this Court sustained the defendant's preliminary objections in the nature of a demurrer to two of the four counts in the complaint. Thereafter, the defendant filed an Answer and New Matter to which the plaintiff filed a Reply. Discovery was conducted and thereafter the defendant filed this motion for summary judgment on Counts I and III of the plaintiff's complaint.

Count I of the plaintiff,s complaint is based on the breach of an alleged oral year to year employment contract. The plaintiff contends that his employment at Air Products was not "at-will" and that his discharge was in contravention of an oral employment contract entered into at the time he was hired.

An employment contract of indefinite duration is deemed to be terminable at will for any cause or no cause. Price v. Confair, 366 Pa.

538, 542, 79 A.2d 224, 226 (1951); Slonaker v. P.G. Pub. Co., 338 Pa. 292, 296, 13 A.2d 48, 50 (1940), "[A]bsent a statutory or contractual provision, the employer's right to hire and fire is virtually absolute." O'Neill v. ARA Services, Inc., 457 F. Supp. 182, 186 (E.D. Pa. 1978).

The first issue we must address is whether the discharged employee has overcome the at-will presumption by presenting evidence which, when viewed in the light most favorable to him as the non-moving party, shows that he and Air Products contracted for something other than at-will employment. For the reasons discussed below, we find that the plaintiff has failed to overcome the at-will presumption.

The Superior Court of Pennsylvania recently discussed this issue on facts similar to the case at bar, In Darlington V. General Electric, Pa. Super. , 504 A.2d 306 (1986), the plaintiff alleged that his discharge violated an employment contract entered into at the time he was hired which provided that the term of his employment was to be for a reasonable length of time. Darlington contended that the totality of circumstances surrounding his hiring envinced the parties' intent that the employment was to be for a reasonable length of time. The factors Darlington relied upon included his recruitment by General Electric, the fact that he surrendered his former position to work at General Electric, the fact that he was hired to fill a professional position, and the fact that he was hired to work on long-term government projects. The Superior Court rejected Darlington's argument noting that "[d]efiniteness is required to overcome the at-will presumptions," Darlington, supra. at, 504 A.2d at 312.

Where there is no language in the contract relevant to termination of an employee, "then by implication [the employer and employee] have almost invariably supplied a term allowing either party to terminate at will." Id. citing E. A. Farnsworth, Contracts 532 (1982). "Courts are highly reluctant to make definite that which the parties themselves failed to do." Darlington, supra, at i 504 A.2d at 312.

As in Darlington, the plaintiff herein claims he was hired under an employment contract which he maintains was on a year-to-year basis. In support of his argument, the plaintiff points to certain documents, including highlights of employee benefit programs for salaried employees, the 1978 Air Products Annual Report and a performance planning and appraisal guide. However, nothing in these documents constitutes a contract of employment nor is there any indicia of any promise by Air Products of a definite duration of employment.

The plaintiff further contends that the promise of a year-to-year agreement was implied through the procedure of annual salary increases, annual employee reviews, and annual objectives for employees. The parties' own interpretation of a contract, as shown by their

acts and declarations, "will ordinarily be adopted by the court." Darlington, supra. at- 504 A.2d at 313, citing Armstrong v, Standard Ice Co., 129 Pa. Super, 207, 213, 195 A. 171, 173 (1937). However, in the case at bar, Air Products' annual reviews, objectives etc., may be readily accounted for by something other than a desire to adhere to an existing contract. This action is simply too indefinite to support such an interpretation. "Reliance on the vague and conclusory statements contained in the material of record is insufficient as a matter of law to establish a specific term of employment." Rogers v. International Business Machines Corporation, 500 F. Supp. 867, 869 (W.D. Pa. 1980). Adams v. Budd Co., 583 F. Supp. 711, 714 (E.D. Pa. 1984). In light of the fact that the contract itself afforded no inference that the employment was not to be terminable at will, we find that the plaintiff has established nothing more than conclusory allegations in support of his contention of a year-to-year agreement, See, Darlington, supra, at , 504 A.2d at 313-14 distinguishing Lubrecht v. Laurel Stripping Company, 387 Pa. 393, 127 A.2d 687 (1956).

The plaintiff also maintains that there was sufficient additional consideration present which by itself, was sufficient to overcome the at-will presumption, He argues that he had to move his family from West Virginia in order to accept employment at Air Products. This move, he contends resulted in significant economic losses to him.

Pennsylvania courts recognize that contracts for an indefinite period can be brought out of the at-will presumption by a showing that the employee gave his employer consideration other than the services for which he was hired. See Lucacher v. Kerson, 158 Pa. Super. 438, 45 A.2d 245 (1946). When sufficient additional consideration is present, courts infer that the parties intended that the contract will not be terminable at-will. Darlington, supra. at , 504 A.2d at 314; Huguet v. Foodsales, Inc., 19 Pa, D. & C.3d 376 (1980). A court will find additional consideration when an employee affords his employer a substantial benefit other than the services which the employee is hired to perform, or when the employee undergoes a substantial hardship other than the services which he is hired to perform. Darlington, supra, at , 504 A.2d at 315. In the case at bar, we do not believe that the plaintiff rendered sufficient additional consideration to overcome the at-will presumption.

The Darlington court cites Lucacher v. Kerson, 158 Pa.Super. 437, 45 A.2d 245 (1946), for the proposition that additional consideration will be regarded as sufficient when the new employee must undergo a substantial hardship such as moving his family to take the new position. Although we agree that the plaintiff like the defendant in Lucacher underwent a substantial hardship when he moved to take a new position, we believe the instant case is distinguishable and justi-

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fies a different holding. In Lucacher, the plaintiff moved from New York to Philadelphia in order to take a job with the defendant. Pursuant to an oral agreement, the plaintiff was to be "permanently employed" at a salary of $85.00 a week commencing April 10, 1944. The plaintiff worked for three days and on the fourth day he was dismissed from his employment. The court found that the plaintiff had overcome the at-will presumption and the contract of employment was enforceable. In the case at bar, Madej moved from West Virginia to Pennsylvania pursuant to an oral agreement of employment for an indefinite duration. Madej worked for Air Products for almost three and one half years before he was discharged. During this time he did receive salary increases and he was promoted, We believe the different agreement and the differing lengths of employment are significant. Lucacher relocated when he was promised "permanent" employment. He worked for three days and was dismissed on the fourth. After working for more than three years for Air Products in Pennsylvania under a general employment agreement, Madej cannot now, in our judgment, say that moving to take the job constitutes a substantial hardship sufficient to overcome the at-will presumption. We, therefore, do not find that Madej has shown sufficient additional consideration to overcome the at-will presumption.

Since the plaintiff,s employment at Air Products was "at-will," his discharge was not a contravention of the oral employment contract entered into at time he was hired. We, therefore, grant Air Products' motion for summary judgment on Count I of the plaintiff's complaint.

Count III of the plaintiff's complaint is based on the doctrine of promissory estoppel. A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Murphy, et al. v. Burke, et al., 454 Pa. 391, 397, 311 A.2d 904, 908 (1973). The plaintiff has alleged several promises which he contends induced him to action of a definite and substantial character. In support of this contention the plaintiff refers to several documents. The plaintiff contends that these documents show that Air Products promised "early responsibility, rapid advancement, and excellent opportunities for continued personal career growth and development at Air Products," among other things. We find these statements are more promotional in nature than promissory. The doctrine of promissory estoppel is restricted to cases where a promise is made. Fried v. Fisher, 328 Pa. 497, 196 A. 39 (1938). After reviewing all the documents referred to by the plaintiff, we believe that no promises were made by Air Products to the plaintiff. We, therefore, grant Air Products' motion for summary judgment with respect to Count III of the plaintiff's complaint.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00112 Philadelphia 1987

J. 38015/87 (1 of 5 page original)

W. VICTOR MADEJ, Appellant vs.
AIR PRODUCTS & CHEMICALS, INC., Appellee

Appeal from the Order of the Court of Common Pleas of Lehigh County, Civil at No. 84-C-1960.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common pleas of LEHIGH County be, and the same is hereby AFFIRMED.

BY THE COURT:
Signature of PROTHONOTARY

Dated: - November 5, 1987

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00112 Philadelphia 1987

J. 38015/87 (2 of 5 page original)

W. VICTOR MADEJ, Appellant vs.
AIR PRODUCTS & CHEMICALS, INC., Appellee

Appeal from the Order of the Court of Common Pleas of Lehigh County, Civil at No. 84-C-1960.

BEFORE: MONTEMURO, KELLY and CERCONE, JJ.

MP:) FILED Nov 5 1987

MEMORANDUM:

This is an appeal from an Order granting appellee's motion for summary judgment in an action grounded upon a claim of wrongful discharge.

In 1979, allegedly as a result of enticements such as rapid advancement and excellent opportunity, appellant resigned his job in West Virginia and relocated with his family to Allentown, Pa. to assume employment with appellee, foregoing other employment possi-

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bilities to do so. In 1982, after yearly salary increments and a promotion, appellant's employment was terminated resulting in the instant action.

Preliminarily we note that appellant's complaint contains ' four courts stating causes of action for: (1) breach of year to year employment contract; (2) breach of an implied covenant of good faith and fair dealing; (3) promissory estoppel, and (4) violation of public policy. However, the order granting summary judgment from which this appeal lies refers only to counts 1 and 3. Appellee's successful demurrer to the remaining counts 2 and 4, generated no appeal.[1] Therefore, of four(4) issues presented to this court, which substantively track the counts of the complaint, only two(2) are properly before us.

Ordinarily, an Order dismissing only some counts of a multi-count complaint is interlocutory and unappealable. Leach v. Hough, Pa., 507 A.2d 848 (1986). The rationale for this rule is the avoidance of piecemeal litigation, since it is assumed that the remaining counts may still be tried. Here the remaining counts have also been dismissed, albeit on different grounds, and the litigator is out of court altogether, rendering the partial summary judgment order final and appealable. We may therefore address the issues to which the summary judgment refers. The standard for determining whether a grant of summary judgment is appropriate in any given case is by now a familiar one, and was recently reiterated in Martin v. Capitol Cities Media, Inc., Pa. Super. , , 511 A.2d 830, 834 (1986):

> Summary judgment may be granted if the pleadings, deposition, answers to interrogatories and admission on file, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Williams v. Pilgrim Life Insurance Co., 306 Pa. Super. 170, 452 A.2d 269 (1982); Scheetz v. Borough of Lansdale, 64 Pa. Cmwlth.Ct. 24, 438 A.2d 1048 (1982). It is basic that summary judgment may be entered only in a case that is clear and free from doubt. Dunn v. Teti, 280 Pa. Super. 399, 421 A.2d 782 (1980); Tom Morello Consstruction Co. v. Bridgeport Federal Savings & Loan Association, 280 Pa. Super. 329, 421 A.2d 747 (1980).

Rossi v. Pennsylvania State University, 340 Pa. Super. 39, 45, 489 A.2d 828, 831 (1985).

---

1 Although the Orders sustaining the preliminary objections and granting the summary judgment respectively were entered on the same day, appellant's notice of appeal refers only to the latter.

The threshold inquiry in this case is the nature of appellant's status, that is, whether his employment was at-will. Veno v. Meredith, Pa. Super. , 515 A.2d 571 (1986). Darlington v. General Electric, 350 Pa. Super. 183, 504 A.2d 306 (1986). Where the contract is of indefinite duration, the presumption is that it is terminable at will. Prace v. Confair, 366 Pa. 538, 79 A.2d 224 (1951).

Appellant argues that the at-will presumption is overcome in his case because the parties' intention was that the contract was to be on a year-to-year basis, that is of specific duration. In support of his contention, appellant relies upon certain documents, e.g., appellee's Annual Report, its performance appraisal guide, and certain yearly procedures, such as salary increases and employee reviews. However, all of the materials cited point simply to an accounting methodology which is neither unique to appellee, nor translatable into a status definition for appellant. In short, it does not offer a temporal certainty to the relationship between the parties. As the trial court pointed out:

Where there is no language in the contract relevant to termination of an employee, 'then by implication [the employer and employee] have almost invariably supplied a term allowing either party to terminate at will.' [Darling] citing E.A. Farnsworth, Contracts 532 (1982). 'Courts are highly reluctant to make definite that which the parties themselves failed to do.' Darlington, supra. at , 504 A.2d at 312. Trial Court Op. at 4.

Appellant also maintains that his move from West Virginia to Pennsylvania and its attendant inconveniences provided sufficient additional consideration to overcome the at-will presumption citing in support Lucacker v. Kerson, 158 Pa. Super. 437, 45 A.2d (1946). In Lucacker, the appellant relocated pursuant to an oral agreement which provided that that he was to be "permanently employed." His 'permanency' lasted only 3 days. Herein appellant's dismissal occurred 3½ years after the transfer and without the promise of permanency. During this period appellant received salary increases and a promotion. The analogy with Lucacker is therefore tenuous indeed. The appellant herein by his relocation, and by the foreclosure of other employment possibilities available at the time of his acceptance of appellee's offer, has not demonstrated a "substantial" hardship beyond what is normally the case in professional advancement. Darlington, supra; Veno, supra. In short, appellant has failed, by any of his arguments, to overcome the at-will presumption.

Corollary to appellant's major claim, is the argument that the trial court usurped the fact-finding responsibility of a jury by interpreting (adversely) appellant's proofs of the alleged year-to-year contract. Since this argument presumes the persuasiveness of the documents

in exempting appellant from the at-will rule, its reasoning is somewhat circular. Moreover, it is unsupported by of record evidence deserving of jury consideration. Compare Ross v. Montour Railroad Co.,- Pa. Super.-, 516 A.2d 29 (1986).

Appellant next challenges the summary disposition of his case based on promissory estoppel. He argues that genuine issues of material fact exist regarding his detrimental reliance on appellee's alleged promises of a "career" (read permanent) position. This simply restates appellant's earlier claim using different documents. The court found the particular materials here referred to as promotional rather than promissory in nature, and that the promise essential to promissory estoppel had not been established. We see no reason to disagree.

Order affirmed.

(State Seal)

Supreme Court of Pennsylvania

Eastern District

June 27, 1988

ARLENE F. LACHMAN, Esq. PROTHONOTARY
TRICK TASSOS, DEPUTY PROTHONOTARY

468 CITY HALL
PHILADELPHIA, PA 19107
(215) 560-6370

Victor Madej
5 Birch Circle
entown, Pa 18103

RE: W. Victor Madej, Petitioner v.
Air Products and Chemicals, Inc.

No. 950 E.D. ALLOCATUR DOCKET 1987

Dear Mr. Madej :

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"June 22, 1988.

DENIED.

Per Curiam".

Very truly yours,
(Signature)
Marlene F. Lachman, Esquire
Prothonotary

/ma
cc: Steven A. Bergstein, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the foregoing document upon the following person(s) by depositing same in the United States Mail, regular, first-class mail, postage pre-paid, addressed as follows:

Honorable John E. Backenstoe
President Judge, Court of Common Pleas
Lehigh County Courthouse
5th & Hamilton Streets
Allentown, Pa 18101

Steven A. Bergstein, Esquire
Frank, Frank, Penm & Bergstein, P.C.
931 Hanlilton Mall
P.0. Box 419
Allentown, Pa 18105

W. Victor Madej

DATED: 31 October 1988

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468 CITY HALL
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(215) 560-6370

W. Victor Madej
[illegible] Birch Circle
[illegible]entown, Pa 18103

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BEST AVAILABLE COPY

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Allentown, Pa 18105

W. Victor Madej

DATED: 31 October 1988

Supreme Court, U.S.
FILED
NOV 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-740

In The

Supreme Court of the United States

October Term, 1988

W. VICTOR MADEJ,

Petitioner,

v.

AIR PRODUCTS & CHEMICALS, INC.,

Respondent.

On Appeal from the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT

STEVEN A. BERGSTEIN, Esquire
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(215) 435-8091

Attorney for Respondent

November 29, 1988

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SUMMARY OF ARGUMENT

This case is not properly before this Court. The petition for writ of certiorari should be denied for the following reasons: Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1) yet the case never went to a Court of Appeals; rather, final judgment was rendered by the Supreme Court of Pennsylvania. As a result, petitioner has not correctly invoked this Court's jurisdiction.

Under Supreme Court Rule 17.1, this Court should not grant the petition since the Pennsylvania Supreme Court did not decide a federal question in any way in conflict with a decision of another state court of last resort or a federal Court of Appeals. Further, the Pennsylvania Supreme Court did not decide an important question of federal law which has not

been, but should be, settled by this Court, nor did it decide a federal question in a way in conflict with applicable decisions of this Court.

The constitutional issue raised and argued in the petition was never raised at the trial court level. Even if that issue had been raised at the trial court, which twice considered this case, petitioner's appeal to the Pennsylvania appellate courts was limited to two other issues, neither of which involved a constitutional or federal question.

In short, petitioner cites no valid reason under Supreme Court Rule 17 as to why the petition should be granted.

The petition should also be denied for failure to comply with Supreme Court Rules 21.1(g), (h) and (j), 20 and 28.2. Petitioner's statement of the case fails to set forth with specificity the stage in the proceeding at either the trial or

appellate levels at which any federal question sought to be reviewed was raised, the method or manner by which the federal question was raised as well as the court decision relating thereto, and pertinent quotations of specific portions of the record or summaries thereof where the matter appeared. Lastly, petitioner fails to establish why his proposed federal question is timely and properly raised so as to confer jurisdiction upon this Honorable Court to review the judgment on a writ of certiorari.

The petition in this case was originally untimely filed on September 26, 1988, more than ninety (90) days following the Supreme Court of Pennsylvania's denial of appeal on June 22, 1988 which violates Supreme Court Rule 20. Petitioner's attempt to correct this error consisted of the filing of a notarized statement by Attorney Richard

J. Orloski. That statement reveals that Attorney Orloski did not personally observe petitioner mail the petition to the Clerk of the Supreme Court of the United States; to the contrary, the entire basis for Attorney Orloski's statement was information supplied by petitioner himself. This is not sufficient under Rule 28.2.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE DENIED SINCE THE CASE IS NOT PROPERLY BEFORE THE SUPREME COURT OF THE UNITED STATES.

At the outset, Respondent[1] contends that petitioner has failed to state proper grounds upon which the jurisdiction of this Honorable Court may be invoked. In his petition at page vii, petitioner states that the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). That section provides for review of cases in the Court of Appeals. The last appellate court to affirm the judgment of the trial court in this matter was the Pennsylvania Supreme Court (see petition at page vii and 34). Due to the failure to properly invoke the juris-

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[1]Supreme Court Rule 28.2 listing: Respondent, Air Products & Chemicals, Inc. is a parent company of a number of wholly owned subsidiaries.

diction of this Court, the petition for writ of certiorari should be denied.

An additional reason why the petition should be denied is that none of the reasons normally considered under Supreme Court Rule 17.1 for review of a petition for writ of certiorari apply in this case. Rule 17.1(a) is inapplicable since no federal court of appeals has ever rendered a decision in this case. Rule 17.1(b) is inapplicable since the state court of last resort, in this case the Pennsylvania Supreme Court, never decided any federal question in this case. Similarly, Rule 17.1(c) is inapplicable since the Pennsylvania Supreme Court did not decide any question whatsoever regarding federal law.

Moreover, the constitutional issue petitioner now attempts to raise was never pled by petitioner nor was it ever

argued or considered by the trial court in either of its opinions. (see petition pages 18-29). Further, petitioner never appealed from the order of the trial court granting the demurrer of respondent to the count of petitioner's Complaint (Count IV) which he now cites as the source of his constitutional argument based on free speech. (see petition pages 5, 18-29, and 31). This count alleged that petitioner's dismissal was a violation of public policy. The general, well established rule is that a federal appellate court, and the Supreme Court of the United States in particular, should not consider an issue not passed upon, raised or resolved in the lower court. California v. Taylor, 353 U.S. 553, 557 n.2, 77 S.Ct. 1037, 1039-40, 1 L.Ed. 2d 1034, 1037 (1957). In the instant case, petitioner not only failed to plead or argue his constitutional

claim at the trial court level so that the trial court never passed on the issue, but also failed to preserve his right to appeal that issue through Pennsylvania's appellate courts. He should not now be permitted to raise the issue for the first time before this Honorable Court.

II. THE PETITION FOR A WRIT OF CERTIORARI MATERIALLY FAILS TO CONFORM TO SUPREME COURT RULES 20, 21 and 28.2.

The petition specifically fails to conform with Supreme Court Rule 21.1(h) in the following respects: Petitioner seeks review of the judgment of a state court, but his statement of the case fails to specify the stage in the proceedings, both in the court of first instance and in the appellate courts, where the federal question sought to be reviewed before this Court was raised. The "federal question" in this case,

which petitioner characterizes as a constitutional issue of free speech, was in fact first raised and argued before the Superior Court of Pennsylvania to which petitioner had appealed from the rulings by the trial court. (see petition page 31). The free speech issue was not properly pleaded or argued before, nor was it ever considered by, the trial court. Indeed, petitioner did not even properly appeal that issue when represented by counsel as noted by the Superior Court. (see petition, page 31).

Perhaps for the above reason, petitioner also conveniently fails in his statement of the case to specify the method or manner by which he raised the "federal question" and the way in which it was passed upon by the Pennsylvania appellate courts. He also fails to cite any pertinent quotations of specific portions of the record and he fails to

provide a summary thereof with specific reference to the places in the record where the matter appears. Most importantly, he fails to show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on petition for writ of certiorari.

The petition also violates Supreme Court Rule 21.1(j) in that the argument does not amplify any reasons relied upon for the allowance of the writ as provided in Rule 17. Reference is hereby made to the first section of the Respondent's argument.

Under Supreme Court Rule 20, the petition in this case had to be submitted on or before September 20, 1988 which was 90 days following the Supreme Court of Pennsylvania's denial of appeal on June 22, 1988. In fact, the petition was received by the clerk on September 26,

1988 and was returned to petitioner not docketed.

Subsequently, petitioner resubmitted his petition with a notarized statement under Supreme Court Rule 28.2 signed by Attorney Richard J. Orloski. That statement reveals that Attorney Orloski swore that petitioner timely mailed his petition based solely on information supplied to him by petitioner. Orloski did not observe petitioner mail the petition and states only that he believes petitioner's statement to him that he timely mailed the petition.

Rule 28.2 specifically requires that the notarized statement set forth the details of the mailing and that the statement be based on the "knowledge" of the attorney/affiant. This certainly was not the case in the instant situation. Supreme Court Rule 28.2 requires some

independent personal knowledge of the attorney, not a statement based totally on information supplied by the petitioner. Accordingly, the petition should be denied for failure to comply with Rules 20 and 28.2.

III. CONCLUSION

For all of the above reasons, it is respectfully requested that the petition for a writ of certiorari in this case be denied.

Respectfully submitted,

FRANK, FRANK, PENN &
BERGSTEIN, P.C.

By: _____

Steven A. Bergstein, Esquire
931 Hamilton Mall
P.O. Box 419
Allentown, PA 18105
(215) 435-8091
Attorney for Respondent,
Air Products & Chemicals, Inc.

CERTIFICATE OF SERVICE

I, Steven A. Bergstein, Esquire, hereby certify that, at my direction, forty (40) true and correct copies of Respondent's Brief were sent on November 29, 1988 by Federal Express to:

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Three (3) copies of same were mailed by First Class Mail to:

W. Victor Madej
3355 Birch Circle
Allentown, PA 18103

Steven A. Bergstein

Dated: November 29, 1988

No. 88-740

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1988

W. VICTOR MADEJ,

Petitioner

v.

AIR PRODUCTS & CHEMICALS, INC.,

Respondent

PRAECIPE FOR APPEARANCE

TO THE CLERK OF SAID COURT:

Sir:

Enter my appearance for Respondent, Air Products & Chemicals, Inc., in the above case.

Steven A. Bergstein, Esquire
Frank, Frank, Penn & Bergstein
P.C.
931 Hamilton Mall
P.O. Box 419
Allentown, PA 18105
(215) 435-8091

Date: November 29, 1988